No. 86-891 (4)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MEAD DATA CENTRAL, INC.,
Petitioner,

VS.

WEST PUBLISHING COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF and BRIEF AMICUS CURIAE OF THE LAWYERS CO-OPERATIVE PUBLISHING CO.

In Support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1, The Lawyers Co-Operative Publishing Co. ("LCP") moves the Court for leave to file the attached brief, as *amicus curiae,* in support of the petition of Mead Data Central, Inc. for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Counsel for petitioner has consented to the filing of the brief. To date, we have been unable to reach counsel for respondent, in order to request his consent.

LCP is one of the nation's older and larger law book publishers, whose array of decisional reports, statutes and codes, treatises, and other works include such familiar titles as LCP's Lawyers Edition reports of the decisions of this Court, United States Code Service, California and California Appellate Reports, and American Jurisprudence.[1] As such, LCP is a principal competitor of respondent West Publishing Company, whose counterpart works

[1] Some are published by, or with, Bancroft-Whitney Company, a wholly owned subsidiary of LCP. Per Rule 28.1, we advise the Court that LCP is a New York corporation whose capital stock, and that of its subsidiaries, is privately held.

include West's Supreme Court Reporter, United States Code Annotated, California Reporter, and Corpus Juris.

Although LCP's motion is "not favored" under Rule 36.1, it is presented in the belief that the brief *amicus curiae* may assist the Court in its Rule 17 consideration of both the importance of the questions presented, and the vice of the decision below, particularly in light of West's effort to deflect attention from these matters in its recent Brief in Opposition. LCP's points of motion are these:

1. In its Brief, West portrays the case as a private dispute of no public importance, and even goes so far as to imply that LCP and other publishers should join West's applause of the decision below, which necessarily extends the copyright monopoly to every page of every published report of public law, under the guise of protecting whatever "arrangement" of decisions or statutes is there found. (Br. Opp., 12-13).

2. But just the opposite is true, and an office of LCP's brief is to state why LCP, in contrast to West, believes that the public's right of access to the texts of judicial opinions, statutes, and other embodiments of law should not be impeded by the payment of monopoly tribute to those who publish the law for all to read.

3. The decision below sharply alters the delicate balance of accommodation between private gain and the public necessity of unfettered dissemination of the law, first carefully struck in *Wheaton v. Peters*, 8 Pet. (33 U.S.) 591, 668 (1834). The distinguishing, competitive, and original features of competing law reports are not their common texts of the law as embodied in opinions and statutes, however they may come to be "arranged" in the volumes of each book. Rather, what distinguishes one book from the next is the editorial work product of each publisher, reflected in its own particular headnotes, digests, and annotations. Copyright law properly protects originality in editorial enhancements, but neither West nor anyone else possesses any legitimate claim to "pagination." Page citation is simply the means by which particular passages of the law are conveniently identified by bench and bar, in accordance with custom, practice, and judicially imposed rules of citation. West's views to the contrary deserve a

reply from LCP, so that the Court may know that other law publishers do not share them.

4. West's Brief in Opposition, to which LCP asks leave to respond, is dated December 31, 1986, and a copy was obtained by counsel for LCP only a week ago (January 9, 1987). Technically, therefore, LCP's motion and brief may be out of time under Rule 36.1; if so, we respectfully move also for an extension of that deadline, as it would have been presumptuous of LCP to approach the Court before we knew exactly what West had to say.

CONCLUSION

In *Sony Corporation v. Universal City Studios, Inc.*, 464 U.S. 417, 442-47 (1984), the Court had the benefit of the views of other copyright holders presented at the trial, and in *Continental T.V. Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36, 54-56 (1977), review was likewise aided by briefs *amicus curiae* of other organizations affected by the challenged restraint. Since presentation of similar views here is beyond the spheres of petitioner and respondent, LCP requests leave to do so by way of the brief attached to this motion.

DATED: San Francisco, California
January 15, 1987

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE LAWYERS CO-OPERATIVE PUBLISHING CO.

This brief *amicus curiae,* accompanied by motion for leave to file under Rule 36.1, is presented by The Lawyers Co-Operative Publishing Co. in support of the petition of Mead Data Central, Inc. for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this cause, reported below at 799 F.2d 1219. The importance of the questions presented is at once obvious from the very requirement that bench and bar cite passages of the opinion below, and of other pertinent decisions, according to the precise pages upon which those passages appear in the decisional reports of respondent West Publishing Company.

DESCRIPTION AND INTEREST OF AMICUS CURIAE

Amicus curiae The Lawyers Co-Operative Publishing Co. ("LCP"), founded over a century ago, is among the nation's leading law book publishers, to whose activities respondent West calls attention at pp. 12-13 of its Brief in Opposition here. LCP and affiliate companies publish a wide variety of decisional reports, statutes and codes, treatises and other legal works, among

the most familiar of which are LCP's Lawyers Edition reports of decisions of this Court, United States Code Service, California Reports, and American Jurisprudence.[1]

As such, LCP is one of the many competitors of respondent West, the nation's largest law book publisher, whose counterparts to the works of LCP include such as West's Supreme Court Reporter, United States Code Annotated, West's California Reporter, and Corpus Juris. Indeed, West so blankets the field that the vast majority of offerings by LCP and newer entrants either compete with existing works of West, or spur West to produce counterpart works of its own.[2]

Perhaps, as West intimates (Br.Opp. 12-13), LCP and other established publishers should join West in applauding the decision below, for new entrants who "pirate" West's works doubtless covet the right to star paginate to the works of LCP and others as well. Indeed, West itself is one of those whose activities it condemns, for every volume of West's California Reporter, for example, cheerfully star paginates to the California Reports and California Appellate Reports of LCP's subsidiary Bancroft-Whitney. West's effort to excuse its star pagination, while simultaneously hectoring that of a newcomer (Br.Opp., 8 and n.19) is simply a denial of this reality: Star pagination has been a widespread practice of legal publishers for over a century, and the necessity and propriety of the practice had never been doubted until the decision below.

Therefore, LCP does not support West's position here, and for many of the same reasons that caused a number of broadcast copyright holders to speak out against the position of respondents in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442-

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[1] As noted in the accompanying motion, LCP is a privately held New York corporation. Some of its works are published by or with Bancroft-Whitney Company, a California subsidiary wholly owned by LCP.

[2] Thus, for example, petitioner's electronic "Lexis" service provoked West to offer "WestLaw," and this litigation is no more than an effort by West to fence-out the originator, in order to make up the distance lost in the competitive race.

47 (1984). At stake here is a matter of public interest and necessity perhaps even more significant than that in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), for unfettered access to the pronouncements of judges and legislators is access to the law itself, rather than to the private but interesting memoirs of those who make or faithfully execute the law.

The decision below is a heresy which should be rooted out before it spreads.[3] The Court should not mistake the views of West for those of others in the industry, and the office of this Brief is to set matters straight.

PUBLICATION AND "ARRANGEMENT" OF THE LAW IN TODAY'S MARKETPLACE

A century or more ago, law "reports" were more analogous to today's treatises and casebooks, for reporters of old frequently published only selected portions of the law, chosen by them to serve some purpose other than complete dissemination of all the law.[4] So it is that *obiter dictum* about "arrangement," found in early decisions, must not be considered apart from the historical context in which those statements were made. The court below failed to acknowledge changed circumstances, and thereby ignored critical differences in the dissemination of law by publishers in today's marketplace.

Modern publishers have long since abandoned the "casebook approach," in preference to their respective reports of "all" the

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[3] Patry labels the decisions below "a most extreme misreading" of copyright law. W. Patry, *Latmen's The Copyright Law* 63, n.212 (6th ed. 1986), and the decisions have already spawned litigation between West and LCP's subsidiary, Bancroft-Whitney. See pp. 12-13 of this Brief, *post*.

[4] For example, the reports of Alexander Dallas (1-4 U.S.) were something of a hodge-podge of state and federal decisions, thought by him to be of primary interest to lawyers of Philadelphia. Had William Cranch not departed from this practice, one might find *Marbury v. Madison*, 1 Cr. 137 (1803) bound up together with writ of dower opinions of the Pennsylvania courts, e.g., *Sharp v. Pettit*, 4 Dal. 212 (Pa. Sup. Ct. 1800).

law, be it all the law of a particular field, or all the law pronounced by a particular court or legislature. For this reason, the order of presentation within particular volumes is no part of the process by which the works of individual reporters compete for public attention and acceptance. Simply put, what distinguishes LCP's Lawyers Edition from West's Supreme Court Reporter is not the order of presentation of decisions within each particular volume, but the editorial enhancements of each publisher—the headnotes, digests, and annotations that reflect the original and different work product of each editorial staff. The latter has always been the proper "stuff" of copyright protection in the field of legal publication. Petitioner's "Lexis" service reproduces not a syllable of any editorial work product of West, and so West's statement that Lexis will "supplant" West's books and "WestLaw" is no more than a confession that West's own editorial enhancements do not enjoy universal respect. For this reason, Lexis offers different editorial work product, some of it supplied by LCP under contracts with petitioner.

West's entire argument about star pagination was put to rest in a single terse sentence of *Banks Law Pub. Co. v. Lawyers Co-Operative Pub. Co.*, 169 Fed. 386, 391 (2 Cir. 1909):

> "We concur with [District] Judge Hazel in his reasoning and conclusion that the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details."

West quotes dictum in *Callaghan v. Myers*, 128 U.S. 617, 649 (1888), about "case arrangement" (Br.Opp., 8), but that is exactly what plaintiff in *Banks* unsuccessfully cited, to which Judge Hazel replied (169 Fed. at 390):

> "This exerpt [of Callaghan] conspicuously intimates that, if the elements infringed consisted simply of the arrangements of the cases and the pagination, a different conclusion would have been reached."

How, then, did the court below fall into such hopeless disagreement with the Second Circuit? The answer, and the reason why a writ should be granted, are one and the same: West's claim of

"arrangement" is nothing but a smokescreen that deflected the attention of the court below from the crucial distinction between uncopyrightable *dissemination* of law and copyrightable comment *about* the law. That is why copyright law has protected editorial work product, but has never before been extended to pagination of reports, the office of which is merely to enable bench and bar to cite particular passages of law in the manner dictated by custom, practice, and judicially imposed rules of citation. West's effort to erect a tollgate to the dissemination and citation of law flies in the face of the most fundamental principle of *Wheaton v. Peters*, to which we now turn.

WHEATON V. PETERS: NO ONE MAY OWN THE LAW, OR CHARGE A MONOPOLIST'S TAX FOR ITS DISSEMINATION

The delicate balance of accommodation between the interests of private gain and public necessity, most recently before this Court in *Harper & Row v. Nation Enterprises, supra*, was first decisively struck in the very last sentence of *Wheaton v. Peters*, 8 Pet. (33 U.S. 591, 668 (1834)):

> "It may be proper to remark, that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."

By remarkable coincidence, the Court has available to it not only the arguments of counsel in that cause, but also the recent and fascinating address of one who has given his attention to the history and important principles at stake, Craig Joyce, "*Wheaton v. Peters*: The Untold Story of the Early Reporters," printed just a month ago in YEARBOOK 1985 OF THE SUPREME COURT HISTORICAL SOCIETY 34 (1985). From these sources, several truths emerge:

1. The judges "cannot confer" any copyright in their opinions, because Marshall, Story, and the others were "unanimously of opinion" that the public's right of access to its laws was far too important to be the subject of whim or monopoly tax extracted by individual reporters, public or private. C. Joyce, *supra*, at 70-71.

As Mr. J.R. Ingersoll summed up for defendant Peters (8 Pet. (33 U.S.) at 619-22):

> "It is proper here to draw a distinction between *reports*, the immediate emanations from the sources of judicial authority, and mere *individual dissertations*, or *treatises*, or even *compilations*. These may be of great utility, but they are not the law. * * * Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself. * * * The matter which they disseminate is, without a figure, the *law of the land*. * * * Accordingly, in all countries that are subject to the sovereignty of the laws, it is held, that their promulgation is as essential as their existence. * * * It is, therefore, the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination must be to counteract this policy; to limit, or even to regulate it, would, in fact, produce the same effect. Nothing can be done, consistently with our free institutions, except to encourage and promote it."

2. That is what the present case is all about. By custom and practice, those whose calling is the law must be able to cite it freely, paying to publishers only the minimum that competition among reporters fairly extracts. For so long as only one publisher chooses to disseminate the law pronounced by a particular court or legislature, it is undeniably true that all will cite to the pages of his report, and pay him a monopolist's charge for that privilege. But that is a natural and proper monopoly, not a creature of the copyright laws, and it is neither necessary nor appropriate to perpetuate that monopoly by erecting copyright barriers as soon as new entrants emerge in the field. The decision below thereby ignores the distinction between *dissemination* and editorial *comment*, eloquently stated by Mr. Ingersoll, upon which *Wheaton v. Peters* rests.

3. Unfettered dissemination of the law is not only useful for its own sake, but also promotes the public interest of competition among those who disseminate the law as given. Thus, for example, Joyce notes that *Wheaton v. Peters* spawned a surge of

entrepreneurial energy at every level of court reporting, particularly in New York, where the important pronouncements of the great Chancellor Kent previously were held ransom "by the exorbitant price asked by the bookseller." C. Joyce, *supra*, at 91, n. 452, quoting 15 Am. Jurist & L. Mag. 249 (1836), in which it was said:

> "The decision of the Supreme Court of the United States, in the case of *Wheaton v. Peters*, . . . has entirely shaken the right of property in the written opinions of any court. It is presumed that no just cause of complaint will exist in any quarter, if the admirable judgments of Chancellor Kent should be released from the state of confinement in which they are at present kept by means of the large sums asked for the volumes that contain them. The more extended circulation, which they will naturally have, if published in a cheaper form than that in which they now appear, will contribute to the already widespread fame of Chancellor Kent, and to the increase among the profession of a knowledge of the principles of Equity which he has expounded with so much learning and eloquence."

4. West is the principal beneficiary of *Wheaton v. Peters*, and as we have said, for so long as West alone was the only publisher of decisions of, e.g., the several United States Courts of Appeals, it properly enjoyed whatever profit from that endeavor the traffic would bear. But West is no longer in that position, and the custom, practice, and rules of procedure that require bench and bar to cite to its reports is not a basis upon which to award West a copyright monopoly in the page numbers that facilitate compliance with these obligations of the profession.

5. The distinction drawn between that which is essentially part of the law's *dissemination*, and no real part of editorial comment *about* the law, is the very same distinction drawn between former President Ford's uncopyrightable recount of historical fact, and his copyrightable comments about those facts, *Harper & Row v. Nation Enterprises, supra*, 471 U.S. at 556. Neither West's wooden citation of that case, nor its lack of attention to the principle upon which it rests, supports West's position here, for "the arrangement of reported cases in se-

quence," and "their paging and distribution into volumes," are simply details of dissemination, not of original editorial comment, *Banks Law Pub. Co. v. Lawyers Co-Operative Pub. Co., supra*, 169 Fed. at 391.

6. As noted, the claim that "most importantly, star pagination supplants the need for West's reporters" (Br.Opp. 5 n.6) is an admission by West that its headnotes and other original editorial comment are not nearly as desirable to the profession as are the opinions to which they are appended. Extension of the copyright monopoly to page numbers and other details of dissemination is to "block-book" the opinions and editorial comment, contrary to the principles of *United States v. Loew's, Inc.*, 371 U.S. 38 (1962). Per famous footnote 6 of that decision (*id.* at 48), West's reports of decisions in the Federal Reporter are akin to "Gone With the Wind," and West's headnotes are akin to "Getting Gertie's Garter."

The foregoing demonstrates the important public issues presented by the petition, and we now turn briefly to other litigation, whose existence belies West's assertion that the present case is a *sui generis* private dispute of no general interest. (Br.Opp. 12-13).

OTHER LITIGATION SPAWNED BY THE DECISION BELOW

We would be remiss if we failed to mention related copyright litigation, now pending in the district court below, between West and LCP's subsidiary, Bancroft-Whitney Company.[5] We not only discharge our obligation to state the whole of LCP's interest here, but also show, from another perspective, the mischief of the decision below.

Emboldened by the district court's opinion in the present case, and its affirmance by the court of appeals below, West now seeks to erect yet another "tollgate" to the practice of law. Having succeeded to date on its claim of copyright in the means in which judicial opinions are universally cited, West now claims that its

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[5] *Bancroft-Whitney Co. v. West Publishing Co.*, USDC, D.Minn, Civil No. 4-86-473.

dominion extends also to the *numbers* by which state statutes are universally cited. There is, of course, no difference between the two as equally vital tools of the practice of law, for as Mr. Ingersoll remarked in his argument for Peters, *Wheaton v. Peters, supra*, 8 Pet. (33 U.S.) at 619-20:

> "Both descriptions of laws are within the principle; the source from which they spring makes no difference; whether legislative acts, or judicial constructions, or decrees, knowledge of them is essential to the safety of all."

The pending litigation between Bancroft-Whitney and West arises out of the historical fact that, in Texas, West and a predecessor company (Vernon) were the only publishers that chose to disseminate all the statutes adopted by that state's Legislature. This natural monopoly, not a product of copyright or other official grant, is now threatened by Bancroft-Whitney's desire to publish a competing set of statutes and codes, just as it has long done in states such as California.

In 1925, the Texas Legislature recodified all existing civil statutes into a scheme of sequentially numbered articles, and it is now repeating that process in the adoption of sequentially numbered sections of new civil codes. By historical accident, the Legislature has, on occasion since 1925, failed to include an article number in some new civil statues enacted. In its dissemination of these laws, West has accommodated and cured the oversight by numbering them in its books, according to the Legislature's pre-existing scheme.

Uniformly, however, bench, bar, and the citizens of Texas have come to know and cite the laws of that state by article or section number, without regard to whether the number was affixed by the Legislature, or by West's accommodation of legislative oversight. Nevertheless, as in the present case, West asserts that its copyright monopoly extends to those numbers of citation, under the same guise of protecting West's so-called "arrangements."

Although we are comfortable in the belief that the facts of the case just described are such as to preclude application of the rule announced by the court of appeals in the present case, the two matters are in parallel so far as the decision in one spawned the

other, and both proceedings cast a dark shadow over the practice of law and the public's unfettered right to have its laws disseminated by more than one publisher.

It is no answer to say that parallel citations, using different page numbers and different statute numbers, each to describe precisely the same pronouncement of law, is a complete or proper solution (Br.Opp. 13). Parallel citations are hardly a necessity, and disuniformity of citation is surely no proper goal of copyright law. In both spheres of the law—opinions and statutes—expansion of the copyright monopoly to include numbers of citation is to interfere with unfettered dissemination, and to defeat the competitive process that has flourished since *Wheaton v. Peters* drew the proper line of accommodation between dissemination and editorial comment.

The new litigation encouraged by the decision below is typical of that which will inevitably arise so long as that decision remains on the books. That is but another way of demonstrating the need for the writ sought by petitioner here.

CONCLUSION

Amicus curiae The Lawyers Co-Operative Publishing Co. submits that a writ of certiorari should be granted, and the decision below reversed.

DATED: San Francisco, California
January 15, 1987

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